

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs June 5, 2007

TAMMY RENEE MAGGART v. ALMANY REALTORS, INC., ET AL.

Appeal from the Circuit Court for Sumner County
No. 25193C C.L. Rogers, Judge

No. M2005-02532-COA-R3-CV - Filed on July 26, 2007

In this personal injury action, wherein the small office employer was not subject to the Workers' Compensation Act, the employee sought damages against her employer for injuries she sustained at work when a filing cabinet fell on her. The employer denied liability contending the claim was barred based upon a prospective and unconditional "release of liability" the employee had signed prior to the injury. The trial court summarily dismissed the claim finding the release barred the employee's claim. We have concluded that the prospective release of the employer's liability for any injuries the employee might sustain in the course of her employment is void as against public policy and, therefore, vacate the order of dismissal and remand for further proceedings.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Vacated and Remanded

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which WILLIAM B. CAIN and PATRICIA J. COTTRELL, JJ., joined.

Jeffrey O. Powell, Nashville, Tennessee, for the appellant, Tammy Renee Maggart.

Arthur E. McClellan, Gallatin, Tennessee, for the appellees, Almany Realtors, Inc., Frances Almany, and Vicki Louallen.

OPINION

In August of 2002, Tammy Renee Maggart was employed by Almany Realtors, Inc., a real estate brokerage firm, for which she worked as a secretary in the offices of her employer performing a variety of administrative and clerical tasks. As part of her employment, Ms. Maggart also drove to the bank for her employer to deposit business checks.

During the time Ms. Maggart was employed by Almany Realtors the company had only three employees: Frances Almany, the President; Vicki Louallen,¹ the Vice President and Office Manager; and Ms. Maggart, the secretary. The only other persons associated with the company were real estate agents, all of whom were independent contractors. Thus, there were only three employees of Almany Realtors, Inc., during the time Ms. Maggart was in its employ.

After Ms. Maggart had been employed for a few months, and due to a variety of reasons, some of which are disputed, Frances Almany, President of Almany Realtors, Inc., became concerned for the company's potential liability to Ms. Maggart in the event she were injured. As Frances Almany explained in her deposition:

I saw a potential liability for my company for her being injured inside the office or outside the office running errands, and I wanted a release of liability.

I explained it to [Ms. Maggart] in detail and told her that we would need to have a release, that I would not be responsible for her being injured in the office, outside the office, or at any time.

* * *

I explained to [Ms. Maggart] that I have a small company and I have no insurance covering accidents in the office or outside the office, that I would need a release signed by her releasing me and the company from any liability should she be injured, period.

After their discussion, Ms. Maggart agreed to draft a document to relieve Ms. Almany of any potential liability. The inartful document resulting from that conversation reads as follows:

January 23, 2003

To Whom It May Concern:

I, Tammy Renee Bivens [Maggart],² release Almany Realtors, Inc. from any liability if I am running business or personal errands that I agree to do on company time. If I am in an accident or am injured, I will not hold Almany Realtors, Inc. or any employees at fault or liable.

Sincerely,

/s/

Tammy Renee Bivens [Maggart]

¹Ms. Louallen is Ms. Almany's daughter.

²Ms. Bivens married after executing the release and changed her name to Maggart.

One month after signing the above document, Ms. Maggart was injured while working in the offices of Almany Realtors when a filing cabinet fell over, knocking her to the ground. One year later, on February 24, 2004, Ms. Maggart filed a Complaint for damages for the injuries resulting from that accident naming Almany Realtors³, Frances Almany, owner, and Vicki Louallen, Vice President, as defendants.⁴

The defendants answered and pled as an affirmative defense the release of liability drafted and signed by Ms. Maggart.⁵ On June 20, 2004, the defendants filed a Motion to Dismiss pursuant to Tenn. R. Civ. P. 12. Ms. Maggart filed a response to the Motion to Dismiss with a supporting affidavit. The trial court heard arguments on the motions but declined to rule until the parties had the opportunity to take depositions. Following discovery, the parties filed the depositions with the court. Thereafter, the trial court considered but denied the defendants' motion by Order dated March 11, 2005.

On July 9, 2005, the individual defendants, Ms. Almany and Ms. Louallen, filed a motion to alter or amend the March 11 Order. Two weeks later, on July 28, 2005, Ms. Maggart filed a motion to amend her Complaint to correctly name Almany Realtors, Inc., as a defendant. In an Order dated August 8, 2005, the trial court granted Ms. Maggart's motion to name Almany Realtors, Inc., as a defendant. In the same order, the trial court also granted the motion of the individual defendants. Accordingly, they were dismissed from the action, leaving only the corporate employer, Almany Realtors, Inc., as the defendant.

On August 11, 2005, Almany Relators, Inc., filed an Answer to the Complaint and a Motion to Dismiss contending the "release of liability" drafted and signed by Ms. Maggart barred any claim for injuries against her employer. The trial court, on September 28, 2005, entered an Order stating it considered "Defendant's Motion pursuant to TRCP 56" and that it had considered "the record as a whole" and from all of which it appeared to the court that the matter should be dismissed because there were no genuine issues of material fact. The trial court certified the Order as final and appealable, from which Order Ms. Maggart appeals.

³Ms. Maggart's initial Complaint named Almany Relators as the employer. The correct company name of the defendant is Almany Realtors, Inc.

⁴Prior to filing suit, Ms. Maggart had left the employment of Almany Realtors, Inc., to accept employment elsewhere.

⁵None of the parties allege a claim or defense under the Workers' Compensation Act. In fact, the Act is not addressed with the exception of passing references that Almany Realtors Inc., did not have workers' compensation insurance. We therefore conclude the employer was exempt from the Act because it had less than five (5) employees.

STANDARD OF REVIEW

Although the defendant's motion was presented pursuant to Tenn. R. Civ. P. 12.03, the trial court considered the matter as a motion for summary dismissal pursuant to Tenn. R. Civ. P. 56. This is evident from the fact the trial court's final order states the court dismissed the case based on a Motion to Dismiss pursuant to Rules 12.03 and 56 of the Tennessee Rules of Procedure. It is further evident because the trial court stated it considered "the record as a whole," and the record included affidavits and depositions of the parties and the argument of counsel. Tenn. R. Civ. P. 12.03 provides, "if matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, . . ." Accordingly, the issues were resolved in the trial court upon summary judgment and shall be reviewed accordingly.

Summary judgments do not enjoy a presumption of correctness on appeal. *BellSouth Advert. & Publ'g Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003). This court must make a fresh determination that the requirements of Tenn. R. Civ. P. 56 have been satisfied. *Hunter v. Brown*, 955 S.W.2d 49, 50-51 (Tenn. 1997). We consider the evidence in the light most favorable to the non-moving party and resolve all inferences in that party's favor. *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002). When reviewing the evidence, we first determine whether factual disputes exist. If a factual dispute exists, we then determine whether the fact is material to the claim or defense upon which the summary judgment is predicated and whether the disputed fact creates a genuine issue for trial. *Byrd v. Hall*, 847 S.W.2d 208, 214 (Tenn. 1993); *Rutherford v. Polar Tank Trailer, Inc.*, 978 S.W.2d 102, 104 (Tenn. Ct. App. 1998).

Summary judgments are proper in virtually all civil cases that can be resolved on the basis of legal issues alone, *Byrd*, 847 S.W.2d at 210; *Pendleton v. Mills*, 73 S.W.3d 115, 121 (Tenn. Ct. App. 2001); however, they are not appropriate when genuine disputes regarding material facts exist. Tenn. R. Civ. P. 56.04. The party seeking a summary judgment bears the burden of demonstrating that no genuine disputes of material fact exist and that party is entitled to judgment as a matter of law. *Godfrey*, 90 S.W.3d at 695. Summary judgment should be granted at the trial court level when the undisputed facts, and the inferences reasonably drawn from the undisputed facts, support one conclusion, which is the party seeking the summary judgment is entitled to a judgment as a matter of law. *Pero's Steak & Spaghetti House v. Lee*, 90 S.W.3d 614, 620 (Tenn. 2002); *Webber v. State Farm Mut. Auto. Ins. Co.*, 49 S.W.3d 265, 269 (Tenn. 2001). The court must take the strongest legitimate view of the evidence in favor of the non-moving party, allow all reasonable inferences in favor of that party, discard all countervailing evidence, and, if there is a dispute as to any material fact or if there is any doubt as to the existence of a material fact, summary judgment cannot be granted. *Byrd*, 847 S.W.2d at 210; *EVCO Corp. v. Ross*, 528 S.W.2d 20 (Tenn. 1975). To be entitled to summary judgment, the moving party must affirmatively negate an essential element of the non-moving party's claim or establish an affirmative defense that conclusively defeats the non-moving party's claim. *Cherry v. Williams*, 36 S.W.3d 78, 82-83 (Tenn. Ct. App. 2000). Issues as to interpretation and application of unambiguous contracts are likewise issues of law, the

determination of which enjoys no presumption of correctness on de novo appellate review. *Doe v. HCA Health Servs. of Tenn., Inc.*, 46 S.W.3d 191, 196 (Tenn. 2001).

ANALYSIS

The only issues raised on appeal concern whether the so-called “release of liability” at issue is ambiguous. We, however, have concluded it is a comprehensive exculpatory agreement between an employer and employee; therefore, as a matter of law, it is void as against public policy because it purports to exonerate the employer from any and all prospective liability for an injury the employee may sustain in the performance of her service to the employer.

It is essential to recognize that Almany Realtors, Inc., did not maintain workers’ compensation insurance for the benefit of its employees. The Workers’ Compensation Act (the Act) specifies that “every employer and employee subject to the Workers’ Compensation Law . . . shall, respectively, pay and accept compensation for personal injury or death by accident arising out of and in the course of employment without regard to fault as a cause of the injury or death” Tenn. Code Ann. § 50-6-103(a). The Act further contains a “supremacy” clause which provides that no contract or agreement, written or implied, “shall in any manner operate to relieve any employer, in whole or in part, of any obligation created by this chapter, except as provided in subsection (b).”⁶ Tenn. Code Ann. § 50-6-114(a). Therefore, exculpatory clauses such as the one at issue are expressly prohibited under the Act.

Almany Realtors, however, is not subject to the Act. This is because it only had three employees and the Act pertains to employers “using the services of not less than five (5) persons for pay.”⁷ Tenn. Code Ann. § 50-6-102(12). Therefore, Almany Realtors was not an employer as defined by the Act and was not subject to the Act. Accordingly, it did not have to maintain workers’ compensation insurance and was not subject to the statutory prohibition against exculpatory clauses.

Because it was not subject to the strictures of the Act, Almany Realtors, Inc., contends it was entitled to the benefits of the well settled legal principle that parties may contract that one shall not be liable for his negligence to another.⁸ See *Crawford v. Buckner*, 839 S.W.2d 754, 756 (Tenn. 1992)

⁶Subsection (b) permits an employer to set off from temporary total, temporary partial, and permanent partial and permanent total disability benefits any payment made to an employee under an employer funded disability plan for the same injury; provided that the disability plan permits such an offset. Tenn. Code Ann. § 50-6-114(b). The offset from a disability plan however may not result in an employee's receiving less than the employee would otherwise receive under the Act. *Id.*

⁷The Act defines “employer” as including “any individual, firm, association or corporation, . . . using the services of not less than five (5) persons for pay, except as provided in § 50-6-113, and, in the case of an employer engaged in the mining and production of coal, one (1) employee for pay.” Tenn. Code Ann. § 50-6-102(12).

⁸The scope and subject of a release of liability generally depends on the intent of the parties as expressed in the release. *Solitron Devices, Inc. v. Honeywell, Inc.*, 842 F.2d 274, 277 (11th Cir. 1988); *Cross v. Earls*, 517 S.W.2d 751, (continued...)

(stating as a general rule, “Tennessee courts have long recognized that, subject to certain exceptions, parties may contract that one shall not be liable for his negligence to another”) (citing *Empress Health and Beauty Spa, Inc. v. Turner*, 503 S.W.2d 188, 190 (Tenn. 1973); *Chazen v. Trailmobile, Inc.*, 215 Tenn. 87, 384 S.W.2d 1 (1964); *Moss v. Fortune*, 340 S.W.2d 902 (Tenn. 1960); *Dixon v. Manier*, 545 S.W.2d 948 (Tenn. Ct. App. 1976)). In the absence of fraud or overreaching, such exculpatory provisions are generally held to be enforceable. See *Houghland v. Security Alarms and Services*, 755 S.W.2d 769, 773 (Tenn. 1988).

What Almany Realtors fails to recognize, however, is that there are exceptions for which exculpation of one’s negligence is not permitted. Although we have not found a case directly on point in Tennessee that pertains to a private employer exempt from the Act, we believe the employer - employee relationship is one of the exceptions to the general principle, as the majority of states have generally held. See 27 AM JUR. 2D *Employment Relationship* § 260 (1996) (noting that agreements between an employer and employee that exonerate the employer from liability for future negligence to be void against public policy).

The closest case we find in Tennessee pertains to a county that attempted to exempt itself from liability under the Governmental Tort Liability Act (GTLA) by adopting “a policy of compensation” for on-the-job injuries. That case is *Crawley v. Hamilton County*, 193 S.W.3d 453 (Tenn. 2006). In *Crawley*, Hamilton County, which had not elected to be subject to the Workers’ Compensation Act, attempted to exempt itself from liability by adopting an “exclusive” policy of compensation for on-the-job injuries. *Id.* at 454. Because the county had not elected to be subject to the rights and responsibilities of an employer under the Act, the Court found that the county could not exempt itself from liability by adopting a “policy” purporting to be an employee’s exclusive remedy for work-related injuries.⁹ *Id.* at 456-57. The Court found such agreements “repugnant to public policy because they allow an employer to insulate itself from tort liability to an employee for an on-the-job injury. *Id.*

The Supreme Court based its holding on a number of decisions in other jurisdictions that held contracts between an employer and an employee, whereby the employer is attempting to exempt itself from liability, null and void as against public policy. *Id.* (citing *Johnston v. Fargo*, 184 N.Y. 379, 77 N.E. 388, 391 (1906) (holding it is the duty of the court to declare invalid an agreement tending to destroy the motive of the employer to be vigilant in the performance of his duty towards his employees); *Western Union Tel. Co. v. Cochran*, 277 A.D. 625, 102 N.Y.S.2d 65, 68-69(N.Y.

⁸(...continued)

752 (Tenn. 1974); *Sherman v. American Water Heater Co., Inc.*, 50 S.W.3d 455, 457 (Tenn. Ct. App. 2001). A release of liability is a contract subject to ordinary rules of contract interpretation. *Bank of America Nat. Trust & Sav. Ass’n. v. Gillaizeau*, 766 F.2d 709, 715 (2d Cir. 1985); *Burks v. Belz-Wilson Props.*, 958 S.W.2d 773, 776 (Tenn. Ct. App. 1997); *Jackson v. Miller*, 776 S.W.2d 115, 117 (Tenn. Ct. App. 1989).

⁹We note that the facts of this case are more repugnant to public policy than the facts of *Crawley*. In *Crawley*, the county afforded the employee some compensation - one year salary, three years of medical benefits, etc. In the case at bar, the employee has *nothing*.

App. Div. 1951) (finding that an agreement between employer and employee wherein employer attempted to exempt itself from liability is void as against public policy); *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. Kinney*, 95 Ohio St. 64, 115 N.E. 505, 508 (1916) (holding that an employer's attempt to exempt itself from liability in contract with employee was void as against public policy)). In its final conclusion, our Supreme Court held “the portion of the Civil Service Policy which purports to exclude the employee from seeking other relief is void because the employee retains the right to sue Hamilton County under the GTLA.” *Crawley*, 193 S.W.3d at 457.

We are further influenced by a line of cases pertaining to exculpation clauses in business contracts that may be deemed void as against public policy based upon certain criteria. The forerunner of these cases is *Olson v. Molzen*, 558 S.W.2d 429 (Tenn. 1977). A pertinent acknowledgment in the *Olson* case was that certain relationships required greater responsibility which render exculpatory releases “obnoxious” and invalid where the public interest would be affected by an exculpatory provision. *Id.* at 430-31.

After concurring with the general principles set forth in the California Supreme Court case of *Tunkl v. Regents of University of California*, 60 Cal.2d 92, 32 Cal.Rptr. 33, 383 P.2d 441 (Ca.1963), which held that where the public interest would be affected by an exculpatory provision, such provision could be held invalid, our Supreme Court adopted the criteria set forth in *Tunkl* as useful in determining when an exculpatory provision should be held invalid as contrary to public policy.¹⁰ The criteria are:

- (a) It concerns a business of a type generally thought suitable for public regulation.
- (b) The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public.
- (c) The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards.

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The meaning of the phrase ‘public policy’ is vague and variable; courts have not defined it, and there is no fixed rule to determine what contracts are repugnant to it. The principle that contracts in contravention of public policy are not enforceable should be applied with caution and only in cases plainly within the reasons on which that doctrine rests. It is only because of the dominant public interest that one who . . . has had the benefit of performance by the other party will be permitted to avoid his own promise.

Belcher v. Belcher, No. E2004-02712-COA-R3-CV, 2005 WL 2333607, at *5 (Tenn. Ct. App. Sep. 23, 2005) (citing *Hoyt v. Hoyt*, 372 S.W.2d 300, 303 (Tenn. 1963)).

(d) As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services.

(e) In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence.

(f) Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents.

Olson, 558 S.W.2d at 431. Applying the relevant criteria the Court adopted from *Tunkl* to the facts in *Olson*, our Supreme Court invalidated the contract between a doctor and patient which exculpated the doctor from liability for his negligence in the performance of medical services on the principle that it violated public policy. *Id.*

The general principles and criteria adopted in *Olson* have been followed in numerous cases. *See Planters Gin Co. v. Federal Compress & Warehouse Co., Inc.*, 78 S.W.3d 885, 893 (Tenn. 2002); *Henderson v. Quest Expeditions, Inc.*, 174 S.W.3d 730, 732-33 (Tenn. Ct. App. 2005); *Carey v. Merritt*, 148 S.W.3d 912, 916 (Tenn. Ct. App. 2004); *Russell v. Bray*, 116 S.W.3d 1, 5 (Tenn. Ct. App. 2003); *Lane Detman, L.L.C. v. Miller Martin, et al*, 82 S.W.3d 284, 292 (Tenn. Ct. App. 2002). In *Russell*, this Court refused to enforce an exculpatory contract between home buyers and the home inspectors. The decision was based upon the Court's conclusion that the exculpatory contracts were offensive to public policy. *Russell*, 116 S.W.3d at 8. The reasons given by the *Russell* Court, which were based on *Olson* factors, were that the home inspectors were professionals whose services affected the public interest. *Id.*

A similar result was reached in *Carey v. Merritt* wherein this Court found additional reasons to declare the exculpation clause in a home inspector's contract void as against public policy. The court found the defendant was "engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public." *Id.* at 917 (quoting *Olson*, 558 S.W.2d at 431). The court went on to note that "the purchase of a home is, perhaps, the largest investment an average person will make" and, therefore, "such inspections by the Defendant are of great importance to the public and a matter of practical necessity for most members of the public." *Id.* The court also found it significant that the plaintiff "was under the control of Defendant [the home inspector] and subject to the risk of his carelessness." *Id.* For these reasons, the court held that "the exculpatory clause between the Plaintiffs and Defendant is contrary to public policy and void." *Id.* at 918. Of further and possibly greater significance, the court emphasized the fact that not all of the factors had to be present in order to invalidate an exculpatory agreement. *Carey*, 148 S.W.3d at 916 (citing *Olson*, 558 S.W.2d at 431).

Regardless of the number of employees an employer may employ and whether the employer is subject to the requirement of the Workers' Compensation Act, the safety and welfare of employees in the workplace is a matter of great importance to the public. Being employed by an employer, as distinguished from being self employed, also constitutes a matter of practical necessity for most members of the public. As a result of the economic setting of the transaction and the essential nature of the employer - employee relationship, the employer possesses a decisive advantage of bargaining strength against the employee, and therefore, the employee is placed under the control of the employer and is subject to the risk of carelessness by the employer. Consequently, and paraphrasing what the Court said in *Olson*, we find the employer - employee relationship, once entered into, involves a status requiring of one party, the employer, greater responsibility than that required of the ordinary person, and therefore, "a provision avoiding liability [to the employer] is peculiarly obnoxious." *Olson*, 558 S.W.2d at 430 (citing WILLISTON ON CONTRACTS, § 1751 (3d ed. 1972)).

For the foregoing reasons, we hold the January 23, 2003 exculpatory agreement signed by Ms. Maggart void as against public policy and unenforceable.

IN CONCLUSION

We vacate the summary dismissal of the claim against Almany Realtors, Inc., and remand this matter to the trial court for further proceedings consistent with this opinion. Costs of this appeal are assessed against Almany Realtors, Inc.

FRANK G. CLEMENT, JR., JUDGE¹¹

¹¹This matter was assigned to the authoring judge in July of 2007.